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mere "oscillations" in the course of judicial settlement will not necessarily control: *Gelpeke v. Dubuque*, 1 Wall. 175; *Shelby v. Guy*, 11 Wheat. 361; *Gardner v. Collins*, 2 Pet. 85. But see *King v. Wilson*, 1 Dill. 555.

Where the decisions of a state are inconsistent, the latest will be followed: *Green v. Lessee of Neal*, 6 Pet. 291; *Leffingwell v. Warren*, 2 Black 599; except where to follow the latest decisions would impair the obligations of a contract: *Gelpeke v. Dubuque*, *supra*.

And in *Morgan v. Curtenius*, 20 How. 1, the Supreme Court of the United States held that it would not reverse a judg-

ment of the United States Circuit Court which, when rendered, followed a decision of the state court, such decision having been overruled by the state court after the United States Circuit Court had rendered its decision. The Supreme Court said that the later decision of the state could not have a retroactive effect upon the decisions of the Circuit Court, and make that erroneous which was not so when the judgment of that court was given. And see *Pease v. Peck*, 18 How. 595, 599; *Rowan v. Runnels*, 5 Id. 134.

ADELBERT HAMILTON.

Chicago.

Supreme Court of Pennsylvania.

SEAMAN v. THE COMMONWEALTH.

Under a penal statute prohibiting worldly employment on Sunday, one whose business is carried on upon that day by his employee, under his authority, is liable to the penalty.

In such case defendant may be convicted upon evidence that his store was open on Sunday; that an employee was making sales, and that defendant himself was present in the store part of the day.

CERTIORARI to the Court of Common Pleas, No. 2, of Allegheny county.

This was an information before an alderman that John W. Seaman, on December 12th 1880, "being the Lord's day, commonly called Sunday, did then and there engage in doing and performing worldly employment or business, to wit, having open his place of business on the corner of Station street and the Pennsylvania Railroad, in the city of Pittsburgh, and then and there engaged in selling, trading and vending tobacco, cigars, candies, &c., contrary to an Act of Assembly approved April 22d 1794, and its several supplements in such case made and provided."

The Act of 1794 referred to provides that "If any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted) * * * every such person so offending shall, for every such offence, forfeit and pay four dollars." By a subsequent statute the penalty in Allegheny county was increased to twenty-five dollars.

At the hearing the testimony was as follows :

A. C. Fulton : "I know John W. Seaman, the defendant. I was in his place of business last Sunday evening. Mr. Seaman was not there. Mr. Woolslare was tending store. I bought some cigars there." Cross-examined : "I was there about fifteen minutes. Don't recollect of others buying there. Jonathan Woolslare was tending store. I did not see Mr. Seaman there."

John H. Hodel : "I know John Seaman the defendant. I was in his place of business on Sunday last. The store was open. Seen sales made there on Sunday last. At one time on Sunday I saw Mr. Seaman there. Saw others in the store. Mr. Fulton and Mr. Woolslare were there."

Upon this testimony the alderman found that defendant was guilty of doing and performing worldly employment or business on Sunday, and imposed the fine prescribed by the statute. Defendant removed the case by *certiorari* to the Court of Common Pleas, which affirmed the judgment, WHITE, J., who delivered the opinion, saying, *inter alia* : "In this case the evidence was that he (defendant) was present in the store on this Sabbath. It is incredible that the clerk was selling on this day without his knowledge and authority; he was there present when the store was open to the public, thus carrying on his worldly business. * * * It is very clear he was there carrying on his business, knowing he was violating the law. The evidence was amply sufficient to prove that he was carrying on a worldly business, prohibited by the law."

Defendant removed the case by *certiorari* to the Supreme Court.

I. P. Hays (*J. S. Strickler* with him), for plaintiff in error.

Carpenter, for defendant in error.

The opinion of the court was delivered by

SHARSWOOD, C. J.—The offence is sufficiently charged in the information. The finding of facts by the alderman is clear, full and specific, and brings the case within the statute. The evidence showed the place of business was kept open on Sunday and an employee was selling cigars. The plaintiff was present a part of the day, and the conclusion is fully justified that the business was

carried on with his knowledge and by his authority. The principal as well as the clerk was liable under the statute.

Judgment affirmed.

The liability of a principal for the acts of his agent is a question governed by very different principles and considerations according as the liability, with which it is sought to affect the principal, is of a civil or a criminal nature. Civilly, of course, the law is well settled, that the principal is liable for all the acts of his agent, done in the course and within the line of his employment, and while acting as the servant of the principal. As to third persons the servant stands as the master; the latter has held him out as his authorize^d representative, and must bear the consequences resulting from the relationship which he has himself established, even if the particular act of the agent for which it is sought to hold the principal responsible, be one which, if he had been present, he would not have approved.

But when criminal liability is considered, the consequences of which affect not merely the pocket, but the reputation and liberty of the accused, we must have regard to something more than a mere delegation of authority. Into crime a moral element enters; there must be, in general, an evil intent, to constitute a man a criminal, and it would be carrying the principle of representation by an agent too far, to hold that the servant represents the moral nature, the moral action of his master, and that an illegal act of his, which might very properly subject the master to a civil action for damages, should at the same time render the master accountable and liable to punishment for a crime with which he was in no way connected except by sustaining the relation of master to the criminal. Of course the above considerations do not imply that a man cannot be guilty of a crime through his servant and be punishable therefor.

Qui facit per alium, facit per se will apply in criminal cases, and indeed, there may be cases wherein the entire guilt rests upon the master who commands the commission of the crime, and not upon the servant by whose hand it is ignorantly committed. A good illustration is found in *Regina v. Bleasdale*, 2 C. & K. 764 (1848), where the defendant being lessee of a mine, mined subterraneously into other lands, and thus stole coal to the value of some 10,000/. The court held Bleasdale accountable and not the ignorant miners; the law being stated thus: "If a man does, by an innocent agent, a felony, the employer and not the agent is accountable criminally."

The general rule may be thus formulated: A principal is not criminally liable for the acts of his agent, unless the act be done by his command or with his assent, express or implied.

What evidence will authorize a finding of assent or command is a matter of some interest, and different views as to the amount of proof necessary have been taken.

In the case of the *State v. McGrath*, 73 Mo. 181, defendant was indicted for illegal sales of liquor made by his clerk. It seems to have been admitted that the sale by a recognised business agent was *prima facie* proof of direction to make such sale by the master, and the contention turned solely on the refusal of the court below to allow the presumption to be rebutted by evidence of what the master's instructions really were. The Supreme Court held that such evidence was admissible, and reversed the judgment. That a sale by the servant is *prima facie* evidence of direction by the master seems to be established law in Missouri, for

although **SHERWOOD, C. J.**, in *State v. Baker*, 71 Mo. 475 (1880), says, "The maxim *qui facit per alium, facit per se*, cited on behalf of the state is only applicable where the instructions are obeyed, not where they are, as the evidence offered tended to show, palpably violated;" still, in that case, the prosecution offered no evidence of direction by the defendant, whose wife and brother had made the illegal sale for which the defendant stood indicted, and the reversal went upon the ground of the exclusion of the defendant's evidence.

This view of the law seems to be supported by the case of the *Commonwealth v. Gillespie*, 7 S. & R. 469 (1822), although that case may be distinguished from the foregoing by the fact that there were certain significant omissions of evidence of innocence, presumably within the control of the defendant, which omissions were considered as strengthening the case of the prosecution. Gillespie, who did not live in Philadelphia, had opened in that city a lottery office, and had kept it for several years. He occasionally visited the city and his office, leaving it in the interim in charge of a lad. The boy, in his employer's absence, sold an illegal lottery ticket endorsed in the name of Gillespie. An indictment for conspiracy to sell illegal lottery tickets was found against the boy and Gillespie. After a conviction there were motions for a new trial and in arrest of judgment. The Supreme Court sustained the conviction, **DUNCAN, J.**, saying: "I did not instruct the jury that Gillespie was criminally answerable for the act of his agent or servant, but I left them to decide whether, from the whole body of the evidence, Gillespie was concerned in the sale of this ticket. The house his; the boy conducting business for him as a lottery broker under his sign, selling this very ticket as his agent and in his name. These were circumstances from which the jury might infer his partici-

pation in the sale of the ticket; more especially as, if the boy had been employed as his agent to sell tickets authorized by the laws of the state and not tickets prohibited, a production of his books would establish his innocence. That criminality, even in acts of the blackest die, might be made out by circumstantial evidence, I put to the jury as examples, libels, sold by a child in the shop of a printer; tippling-houses, liquor sold by a boy; bawdy-houses, where the keeper kept out of view her self, though she was the owner of the house; and I did put it to the jury as a case in which the *evidentiæ rei*, the *res ipsa loquitur*, might afford satisfactory evidence of the participation of Gillespie." See also, *Commonwealth v. Nichols*, 10 Met. 259.

But authority may also be found requiring further evidence than that implied from the mere relation of master and servant to make even a *prima facie* case of guilt of the former, even in cases of the same class as the foregoing. Thus, in *People v. Utter*, 44 Barb. 170 (1864), an indictment was found against a tavern keeper for selling liquor on Sunday, in contravention of a statute. The evidence showed that liquor had been illegally sold in the defendant's house by his bartender. The defence requested the court to charge that, to justify a conviction it was not sufficient to prove that liquor had been sold in the defendant's house on Sunday, but that it must be shown that the defendant did the act personally, or that it was done by his direction or with his assent. The court refused so to charge, but instructed the jury that if they believed that the bartender had sold liquor in the defendant's tavern on Sunday, they might convict, although the defendant was not present at the sale, and was not shown to have authorized it; but that if the defendant had forbidden the sale and it was made in disobedience of his orders, he should be acquitted. It was

held that the court erred in not affirming the defendant's point.

In the principal case, the Supreme Court, in affirming the conviction, relied on the presence of the defendant as evidence of his knowledge of and assent to the violation of the law. In *Morse v. State*, 6 Conn. 9 (1825), it was held that a ratification of an illegal act of an agent would not render the employer criminally liable therefor. The defendant's barkeeper had given credit to a student of Yale College, contrary to statute, and the defendant subsequently ratified the credit. He was indicted and tried, but the Supreme Court held that he was not indictable. HOSMER, C. J., saying: "In the law of contracts a posterior recognition in many cases is equivalent to a preceding command; but it is not so in respect of crimes. The defendant is responsible for his own acts and for those of others done by his express or implied command, but to crimes, the maxim *omnis ratihabito retro rahitur, et mandato equiparatur*, is inapplicable."

In the conflict of authority, it may be a little difficult to say what should be the rule of evidence. On the one hand, it may be said, with great force, that there are some crimes to which the principal may be a party, though the agent only appears therein, of a character such that it would be almost impossible to convict the guilty principal if the act of his known agent were to be excluded from the consideration of the jury, as making a *prima facie* case, and that as the laws of criminal evidence have now generally made the prisoner a witness on his own behalf, no injustice is done or hardship inflicted by calling on him, after showing the illegal act of his agent apparently for the profit of the employer, to clear himself by showing what were the instructions given to his agent, and that the defendant himself did not know of or assent to the acts violating the law. On the other hand, it is to be remem-

bered that a man testifying under a charge, appears to the jury under a great disadvantage, and his manifest interest in his own testimony would naturally go far to discredit him. On the whole, it would seem that the safest rule, and one most in accordance with the spirit of our laws is to hold the prosecution to give some testimony either direct or circumstantial, connecting the defendant with a crime, other than is to be found in the fact that the defendant's servant committed an offence in which his master might possibly have an interest.

To the general rule of liability above stated, we have found two exceptions. The first and best known is that in the case of corporations, which may be indicted for acts of their agents. As a corporation is a body without a soul, and is not possessed of moral attributes, it was for a long time thought and it is frequently stated in old books, that a corporation could not be made criminally answerable. This idea, however, has now been abandoned. The only authority or thing resembling authority for it to be found in the early books is comprised in the declaration in *Sutton's Hospital*, 10 Coke 32, that a corporation cannot commit treason, and the anonymous case in 12 Mod. 559, where Lord HOLT is reported as saying that "A corporation is not indictable, but the particular members of it are." Upon this very slender basis was built up the edifice now overthrown.

As a corporation can act only through its agents, it follows that, if it is indictable, it is then criminally liable for the acts of its servants. At the present day, there is no doubt of the indictability of a corporation other than a municipal one: *Queen v. Birmingham & Gloucester Railway Co.*, 2 G. & D. 236 (1842); *Regina v. Great North of England Railway Co.*, 9 A. & E. (N. S.) 315 (1846); *State v. Morris & Essex Railroad Co.*, 3 Zab. 360 (1852); *Commonwealth v. Proprietors of New Bedford Bridge*, 2

Gray 339 (1854); *Delaware Division Canal Co. v. Commonwealth*, 10 P. F. Smith 367 (1869); and this liability to indictment has been extended even to municipal corporations: *People v. Corporation of Albany*, 11 Wend. 539.

A distinction has been taken between an indictment of a corporation for non-feasance and one for misfeasance, and while the former has been almost universally admitted as proper, it has been denied that the latter can be sustained. The question of the indictability of a corporation for misfeasance arose in this country in *The State v. Great Works Milling and Manufacturing Co.*, 20 Me. 41 (1841), in which the defendant corporation was indicted for illegally erecting a dam. The court held that the indictment would not lie, taking the broad ground that it was impossible for a corporation to commit a crime, even by direct instructions under seal to an agent, for such direction would be *ultra vires*, and that, therefore, however an indictment might be used to complete the doing of an act which a corporation was bound to do and had neglected, an indictment for misfeasance could not be sustained.

The question came before the Queen's Bench in 1846, in *Regina v. Great North of England Railway Co.*, *supra*, and was fully considered. The company was indicted for cutting through and obstructing a highway by works performed in a course not conformable to the powers conferred by Act of Parliament upon the company. Lord DENMAN, in the course of his opinion, said: "The argument is, that for a wrongful act, a corporation is not amenable to an indictment, though for a wrongful omission, it undoubtedly is, assuming in the first place that there is a plain and obvious distinction between the two species of offence. No assumption can be more unfounded. * * * But if the distinction were easily discoverable, why should a corporation be liable for one species of offence and

not for the other? * * * It is as easy to charge one person or a body corporate with erecting a bar across a public road, as with the non-repair of it, and they may as well be compelled to pay a fine for the act as for the omission. * * * We are told that this remedy is not required because the individuals who concur in voting the orders or in executing the work, may be made answerable for it by criminal proceedings; of this there is no doubt. But the public knows nothing of the former; and the latter, if they are identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy be indictment against those who truly commit it, that is, the corporation acting by its majority; and there is no principle which places them beyond the reach of such proceedings." The court held the company indictable.

The question again arose in this country in 1852, this time before the Supreme Court of New Jersey, in *The State v. The Morris & Essex Railroad Co.*, 3 Zab. 360, and both the foregoing authorities were cited to the court, which determined to follow the English rather than the American precedent. GREEN, C. J., delivered a very learned and able opinion, admitting that an indictment would not lie against a corporation for an offence of which a corrupt intent or *malus animus* is an essential ingredient, but showing conclusively that the position taken by the Queen's Bench as to misfeasance of the class of which the erection of a nuisance is an example, was sound and correct. This doctrine was cited and followed in *Commonwealth v. The Proprietors of New Bedford Bridge*, 2 Gray 339 (1854), in which case the court adverted to the impossibility of preventing a public nuisance otherwise than by indictment. The law

may now be regarded as settled, that a corporation may be indicted for misfeasance, subject to the limitation expressed in the *State v. The Morris & Essex Railroad Co.* See, in addition to the above, *State v. Vermont Railroad Co.*, 30 Vt. 108 : *Louisville & Nashville Railroad Co. v. State*, 3 Head 523 (1858). Opposed, however, to the general current stand the Maine case above cited, and *The State v. Ohio & Miss. Railroad Co.*, 23 Ind. 362 (1864), in which the Supreme Court of Indiana cited and followed the *State v. Great Works Milling and Manufacturing Co.*, *supra*.

The second exception is not so well established as the first, but it has been recognised in England by high authority, and may be stated as follows, that where the principal carries on a business with his own capital for his own profit, and employs servants who so conduct the business as to make it a public nuisance, and the proceedings to remedy the same are criminal in form only, the principal will be held liable to an indictment without proof of any participation in or knowledge of the illegal acts on his part. The case in which the exception was announced is the *The Queen v. Stephens*, L. R., 1 Q. B. 702 (1866). The defendant was the owner of a quarry, and was indicted for throwing rubbish therefrom into a river. Evidence was offered to show that the defendant was an old man, who did not personally superintend his quarry, and had prohibited his workmen from throwing the rubbish into the river. BLACKBURN, J., held the evidence immaterial, and the jury gave a verdict of guilty. On the case coming before the court in banc, MELLOR, J., said: "It is quite true that this, in point of form, is a proceeding of a criminal nature, but in substance, I think it is in the nature of a civil proceeding, and I can see no reason why a different rule should prevail with regard to such an act as is charged in the indictment, between proceedings which are

civil and proceedings which are criminal, I think there may be nuisances of such a character that the rule I am applying here would not be applicable to them, but here it is perfectly clear that the only reason for proceeding criminally is that the nuisance instead of being merely a nuisance affecting an individual, or one or two individuals, affects the public at large, and no private individual, without receiving some special injury, could have maintained an action. Then if the contention of those who say the direction is wrong is to prevail, the public would have great difficulty in getting redress. The object of this indictment is to prevent the recurrence of this nuisance. The prosecutor cannot proceed by action, but must proceed by indictment, and if this were a strictly criminal proceeding, the prosecution would be met with the objection that there was no *mens rea*; that the indictment charged the defendant with a criminal offence, when in reality there was no proof that the defendant knew of the act or that he himself gave orders to his servants to do the particular act he is charged with; still, at the same time, it is perfectly clear that the defendant finds the capital and carries on the business which causes the nuisance, and it is carried on for his benefit; although as from age or infirmity the defendant is unable to go upon the premises, the business is carried on for him by his sons, or at all events by his agents. Under these circumstances the defendant must necessarily give to his servants or agents all the authority which is incident to the carrying on of the business. It is not because he had, at some time or other, given directions that it should be carried on so as not to allow the refuse from the works to fall into the river, and desired his servant to provide some other place for depositing it, that when it has fallen into the river and has become prejudicial to the public, he can say he is not liable on an indictment for a nuisance caused by the acts of his servants.

* * * Inasmuch as the object of this indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action, would be sufficient to support an indictment." SHEA, J., concurred with MELLOR, J.

BLACKBURN, J., said: "I only wish to guard myself against it being supposed that, either at the trial or now, the general rule that a principal is not criminally answerable for the act of his agent is infringed. All that it is necessary to say is that when a person maintains works by his capital and employs servants, and so carries on the works, as in fact to cause a nuisance to a private right for which an action would lie, if the same nuisance inflicts an injury upon a public right, the remedy for which would be by indictment—the evidence which would maintain the action would also support the indictment; that is all that it was necessary to decide, and all that is decided."

There is also what, at first blush,

seems another exception to the rule of criminal liability of the employer for the act of his servant, and that is the case of the publisher of a newspaper, who is held criminally accountable for a libel appearing in his paper, without proof of any knowledge on his part of the insertion or the contents of the libellous article. This liability, however, we think, does not constitute such an exception, but rests on a different basis, the ignorant publisher being held responsible for criminal negligence in allowing the libellous matter to be inserted, through not taking sufficient and proper means to prevent his columns being used for wrongful purposes. That this is the true ground of the publisher's liability in such case, appears from the fact that he may shield himself by establishing the fact that he has exercised due care in directing his paper, and that the libel was published notwithstanding such care: 2 Whart. Crim. Law, sect. 2583; *Commonwealth v. Magan*, 107 Mass. 199.

HENRY BUDD.

Philadelphia.

Supreme Court of the United States.

HAWES v. THE CONTRA COSTA WATER COMPANY ET AL.

An individual stockholder of a corporation cannot maintain against the corporation and a third party with whom it is dealing, a suit in equity to protect the interests of the corporation or to enforce its rights against such third party, unless there exists:

Some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred by their charter or other source of organization; or,

Such a fraudulent transaction, completed or threatened, by the acting managers, in connection with some other party or among themselves, or with the other shareholders, as will result in serious injury to the corporation or to the interests of the other shareholders; or,

Where the board of directors, or a majority of them, are acting for their own interests, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or,

Where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.